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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BOBBY J., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and BOBBY J., JR., Appellees.	2 CA-JV 2010-0106 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100JD200700111

Honorable Joseph R. Georgini, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Bobby J. appeals from the juvenile court's August 23, 2010 order terminating his parental rights to his son, Bobby J., Jr., born in September 2009, based on the length of the prison term he then was serving after having been convicted of a felony,

A.R.S. § 8-533(B)(4); the length of time the child was in court-ordered care (six months for child under the age of three years), A.R.S. § 8-533(B)(8)(b); and the fact his parental rights to another child had been terminated for the same cause within the preceding two years, A.R.S. § 8-533(B)(10). He contends there was insufficient evidence to support the termination of his rights based on the length of time in care; the Arizona Department of Economic Security (ADES) and its counsel were guilty of professional misconduct that was prejudicial to him; the attorney who represented him in the proceedings that resulted in the termination of his parental rights to his first child had been ineffective, which prejudiced him in this proceeding involving Bobby Jr.; and the juvenile court erred when it found termination of his parental rights was in Bobby Jr.'s best interest. We affirm for the reasons stated below.

¶2 Just before Bobby's daughter Jesenia was born in September 2008, Bobby was arrested on drug charges, ultimately pleading guilty to possession of drug paraphernalia. Jesenia was adjudicated dependent a few months later and, following hearings in September and November 2009, in a final order entered in December 2009, the juvenile court terminated Bobby's parental rights to Jesenia on the grounds that he had been deprived of his civil liberties due to the conviction of a felony and the maximum release date for his Arizona convictions was January 2012, and the length of time Jesenia had been in court-ordered care. This court affirmed the juvenile court's termination of Bobby's rights to Jesenia in July 2010. *See Bobby J. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2010-0020 (memorandum decision filed July 23, 2010).

¶3 Bobby Jr. was born in September 2009, a year after Jesenia was born. It was determined he had been exposed to methamphetamine. Because the mother had not progressed in her case plan regarding Jesenia and because Bobby was incarcerated, Bobby Jr. was removed from the mother's custody and ADES filed a dependency petition. The mother's parental rights to Jesenia and Bobby Jr. were terminated. Bobby Jr. was adjudicated dependent as to his father in November 2009. Although the initial case plan goal was reunification, after a permanency hearing in February 2010, the juvenile court changed the case plan to severance and adoption and directed ADES to file a motion to terminate Bobby's parental rights, which it did shortly thereafter. Following a contested severance hearing, the court terminated Bobby's parental rights to Bobby Jr. based on the three grounds alleged in the motion: the length of his prison term, the length of time Bobby Jr. had remained out of the home pursuant to a court order, and the fact that Bobby's parental rights to Jesenia had been terminated. § 8-533(B)(4), (8)(b), and (10).

¶4 Before the juvenile court may terminate a parent's rights to his or her child, it must find, based on clear and convincing evidence, that at least one of the statutory grounds for termination exists and that a preponderance of the evidence establishes severing the parent's rights is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 1, 41, 110 P.3d 1013, 1014, 1022 (2005). On appeal, we view the evidence and all reasonable inferences permitted by that evidence in the light most favorable to upholding the juvenile court's order. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). We do not reweigh the evidence

presented to the juvenile court because, as the trier of fact, that court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Consequently, we will affirm the order if there is reasonable evidence in the record supporting the factual findings upon which the court's order is based. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶5 In the heading under the argument subsection of Bobby's opening brief on appeal, he characterizes his first issue as follows: "Did the trial [c]ourt err when it found clear and convincing [e]vidence to sever on the grounds of time in care (6 months) . . . ?" Based on that heading, it appears he intended to challenge the sufficiency of the evidence to support the court's termination of his rights pursuant to § 8-533(B)(8)(b).[1] But in the body of that section, he does not meaningfully address the sufficiency of the evidence on that ground. Rather, he states in general terms that termination should be "a last resort" given the constitutional right involved and recognized by the Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982). He then recites the elements of § 8-533(B)(3), a ground neither alleged nor found here, and asserts, without reference to any specific statutory

[1]Section 8-533(B)(8)(b) provides as follows:

> The child who is under three years of age has been in an out-of-home placement for a cumulative total period of six months or longer pursuant to court order and the parent has substantially neglected or willfully refused to remedy the circumstances that causes the child to be in an out-of-home placement, including refusal to participate in reunification services offered by the department.

ground, that "nothing in the record of these proceedings constitutes clear and convincing evidence that he was unable to parent effectively." At this point in his brief, he then challenges the sufficiency of the evidence to support the termination of his rights pursuant to § 8-533(B)(4). That subsection of the statute permits a court to terminate a parent's rights when "the parent is deprived of civil liberties due to the conviction of a felony . . . if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years." § 8-533(B)(4).

¶6 We need only find sufficient evidence establishing one of the statutory grounds upon which the juvenile court's order was based in order to sustain that ruling on appeal. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000) (if evidence of one alleged severance ground sufficient, appellate court need not address additional grounds). Bobby does not meaningfully challenge the sufficiency of the evidence to support the termination of his parental rights pursuant to § 8-533(B)(8)(b). Nor has he challenged in the rest of his brief, other than obliquely and perhaps as part of his discussion of the length of his prison term, the sufficiency of the evidence to support the court's termination of his rights under § 8-533(B)(10), which provides that a parent's rights may be terminated if "the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause." When a party fails to adequately argue and support an issue that has been raised in an opening brief on appeal, that party may be regarded as having abandoned or waived that issue. *See* Ariz. R. Civ. App. P. 13(a)(6); *see also* Ariz. R. P. Juv. Ct. 106(A) (specifying Rule

13, Ariz. R. Civ. App. P., generally applies to appeals in juvenile cases). Consequently, because he has not meaningfully challenged the findings and conclusions related to the elements of six-month, out-of-home placement, we may sustain the ruling based on that ground alone.[2]

¶7 We note, in any event, that in connection with its termination of Bobby's rights on the ground of out-of-home placement, the juvenile court found he had "substantially neglected or willfully refused to remedy the circumstances that cause[d] the child to be in an out-of-home placement including, but not limited to, the refusal and/or inability to participate in reunification services offered by the Department." The court added that Bobby had "not made any real or significant progress in reunification services offered to him in regard to the child . . . . [His] participation in limited services offered through the Arizona Department of Corrections [is] insufficient to address [his] life long battle with drug usage and criminal behavior." There is adequate evidence in the record to support these findings.

¶8 Moreover, Bobby had been evaluated by psychologist Carlos Vega in March 2009 in connection with the case involving Jesenia. Consistent with his report, Vega testified at the severance hearing Bobby had "antisocial personality traits and he was . . . completely oblivious to the obvious," and was "incapable of gauging what constituted adequate parenting." He added Bobby needed psychological intervention in

[2]Arguably, because he has attempted to challenge the length of the prison term as a ground for termination, he thereby has challenged at least one portion of § 8-533(B)(10). Again, however, so long as the juvenile court's order is sustainable on one ground, we need not address whether it can be upheld on remaining grounds as well.

the form of psychotherapy. Additionally, the case worker stated that Bobby had "made no progress in services offered to him" in the dependency and severance case involving Jesenia before he was incarcerated in August 2009. Nothing in the record persuades us Bobby's conduct with respect to Bobby Jr. demonstrated any progress suggesting the juvenile court's findings on this ground could be regarded as clearly erroneous. *See Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) (appellate court "will not disturb the juvenile court's order severing parental rights unless its factual findings are clearly erroneous, that is, unless there is no reasonable evidence to support them").

¶9 Similarly, notwithstanding Bobby's relatively short prison term, the record supports the juvenile court's finding that the term is of such length that Bobby Jr. will be deprived of a normal home for a period of years. *See* § 13-533(B)(4). Bobby pled guilty to possession of methamphetamine and was sentenced in August 2009; his maximum release date is January 2012. Bobby has an extensive criminal history, including incarcerations for five felony convictions. He has been in prison ten out of fourteen years of his adult life. Because he was incarcerated at the time Bobby Jr. was born, no relationship existed that could have been nurtured during Bobby's continued incarceration, and there was no other parent who could care for Bobby Jr. Further, Bobby did not request visitation with Bobby Jr. and the record did not establish such visitation could have been arranged given the child's age of about nine months at the time of the severance hearing and the fact that Bobby had been incarcerated in Colorado until March or April 2010, and was, at the time of the hearing, in Winslow, Arizona whereas

Bobby Jr. was living hours away in Pinal County. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 24, 995 P.2d 682, 687-88 (2000) (setting forth factors relevant to determination whether to sever parent's rights under § 8-533(B)(4)).

¶10 The record reflects the juvenile court clearly was aware of and considered the factors set forth in *Michael J*. and the decision in *Arizona Department of Economic Security v. Matthew L.*, 223 Ariz. 547, 225 P.3d 604 (App. 2010). The court did not err in implicitly finding *Matthew L.*, in which this court affirmed the juvenile court's denial of ADES's severance motion, distinguishable. 223 Ariz. 548, ¶ 1, 225 P.3d at 605. There, the father had no history of having failed to parent another child adequately. *Id.* ¶¶ 2-5. Indeed, the record established his daughter's custodian brought her to the prison for visitation. *Id.* ¶ 13. Additionally, as this court pointed out, during his incarceration the father had completed a parenting class, courses for drug rehabilitation, and received his high school equivalency diploma. *Id*. ¶ 4. And, we noted, it took ADES six months to arrange paternity testing. *Id*. ¶ 13. Also, although the father had tried numerous times to contact the case manager, she conceded she had not tried to reach him. *Id*. ¶ 4. In reviewing the juvenile court's denial of the severance motion, we emphasized the discretion vested in the juvenile court to consider and weigh all of the relevant factors and that the evidence must be viewed in the light most favorable to sustaining its ruling, concluding the juvenile court had not abused its discretion. *Id*. ¶ 19. Similarly, we have no basis for interfering with the juvenile court's decision here.

¶11 We next address Bobby J.'s argument that ADES "engage[d] in professional misconduct which was prejudicial to [him]." He asserts ADES ignored a

court order entered in the case involving Jesenia and did not conduct a home study of her paternal grandmother to determine if Bobby Jr. could be placed with her until the day before the last day of the severance hearing because ADES's counsel failed to file a motion for reconsideration of that order and miscommunicated with ADES. Bobby asserts he was prejudiced because, as a result, the paternal family was not considered as a potential placement for the child. He reasons that, had Bobby Jr. been placed with them, he would have bonded with Bobby's family and it "would also have allowed the family to take Bobby Jr. to visit [his father] in prison so a father-son bond could be established." But this argument is unavailing for several reasons.

¶12 First, Bobby did not argue this precise issue below. Although Bobby's counsel made clear he believed ADES's counsel had committed "malpractice" and that ADES had violated a court order, the home study ultimately had been completed. Bobby's counsel conceded at the severance hearing, "You've got the home study . . . . it's probably no harm no foul." He then made clear he simply wanted the home study submitted to the juvenile court for its consideration in ruling on ADES's motion to terminate Bobby's parental rights.[3] And, although counsel argued vociferously during

[3]We note that part of the confusion on this issue was because the matter of the child's placement arose during the severance hearing and the juvenile court allowed that issue to be heard simultaneously. As ADES pointed out at the hearing, however, the issue before the court was severance and Bobby had not "filed a petition for a contested severance placement." But the court permitted the issue to be injected into the severance hearing, commenting at the beginning of the hearing that it was related to whether a guardianship or severance was appropriate. Additionally, the availability of placement with the paternal grandmother arguably was related to the issue of Bobby Jr.'s best interest, as ADES argued below. Therefore, we have not rejected the claim on this ground.

the hearing and closing argument that ADES should be sanctioned because of its failure to follow the court's order, he did not assert, as he does on appeal, that it was prejudicial with respect to the grounds for severance set forth in ADES's motion. The argument therefore is waived. *See Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, n.3, 178 P.3d 511, 516 n.3 (App. 2008); *cf. Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 24, 158 P.3d 225, 232 (App. 2007) (failure to object to exhibits at hearing waives issue on appeal).

¶13 Second, even assuming this issue was preserved by Bobby's various objections and arguments before the juvenile court, he has not persuaded us he is entitled to relief from the severance order on this basis. Bobby has not demonstrated that what occurred amounted to misconduct, rather than miscommunication and perhaps negligence. Nor has he cited persuasive authority that, even if there was misconduct, he is entitled to relief. Ultimately, a home study was conducted. And, on the last day of the severance hearing, the court set a further hearing to accept the written home study formally into evidence, making it clear the court would consider the study in rendering a decision. Thus, Bobby was not prejudiced and the evidence presented at the placement portion of the record supports the court's conclusion that placement of Bobby Jr. with the paternal grandmother was not in his best interests. Finally, to the extent Bobby's argument may be construed as a challenge to the post-termination placement order rather than the termination order, he lacks standing to assert that claim because his rights were terminated. *See Antonio M. v. Ariz. Dep't of Econ. Sec.*, 222 Ariz. 369, ¶ 2, 214 P.3d

1010, 1011 (App. 2009); *Sands v. Sands*, 157 Ariz. 322, 324, 757 P.2d 126, 128 (App. 1988).

¶14 Bobby also contends counsel who represented him in connection with the termination of his rights to Jesenia had been ineffective, which prejudiced him in this case because one of the bases for the juvenile court's termination of his rights to Bobby Jr. was that his rights to Jesenia had been terminated on the same grounds. *See* § 8-533(B)(10). Bobby attempted to elicit testimony in this regard and raise this claim in the juvenile court, but the court sustained ADES's objection that any such evidence was irrelevant, while permitting Bobby's counsel to make an offer of proof. Bobby did not raise a claim of ineffective assistance of counsel, however, in the appeal involving Jesenia, arguably waiving it. *See Kimu P.*, 218 Ariz. 39, n.3, 178 P.3d at 516 n.3. Even assuming arguendo the argument was not waived and that such an argument could be made in this appeal, we need not consider it.[4] As we stated, Bobby did not adequately challenge the court's termination of his rights to Bobby Jr. based on the length of time the child was in court-ordered care and we have rejected his claim that there was insufficient

[4]Moreover, in addition to the uncertainty of whether Arizona recognizes a claim of ineffective assistance of counsel in a termination appeal, Bobby has not established his counsel in the proceeding involving Jesenia performed deficiently and that any such deficiency was prejudicial. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶¶ 14, 17-18, 173 P.3d 1021, 1025-26 (App. 2007) (recognizing claim of ineffective assistance insofar as due process and fairness implicated and adopting in termination proceeding two-part standard established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for demonstrating ineffective assistance of counsel in criminal proceeding). And he has cited no authority for the proposition that even if counsel had been ineffective in that proceeding, he could raise it in the proceeding involving Bobby Jr. and this appeal.

evidence to support the order based on Bobby's incarceration. Thus, there are sufficient grounds independent of the ground relating to Jesenia for affirming the court's order.

¶15 Bobby's final contention on appeal is that there was insufficient evidence to support the juvenile court's finding that termination of his rights to Bobby Jr. was in the child's best interests. To establish that finding, a preponderance of the evidence must show the child "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d at 945; *see also In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990) (to establish severance in child's best interests, "petitioner might prove that there is a current adoptive plan for the child").

¶16 Again, to the extent Bobby challenges the placement order and insists Bobby Jr. should have been placed with Bobby's family, he lacks standing to assert that argument. *Antonio M.*, 222 Ariz. 369, ¶ 2, 214 P.3d at 1011. And there was reasonable evidence to support the juvenile court's finding. That evidence included testimony that Bobby had never met Bobby Jr., having been incarcerated before the child was born; that he had a lengthy history of criminal conduct; and that he again had engaged in criminal conduct resulting in a 2.5-year prison term he began serving in August 2009, making it impossible for him to parent Bobby Jr. thus far. The case worker testified visitation was virtually impossible up to the point of the severance hearing because, as we have noted, Bobby had been incarcerated in Colorado and was in Winslow, Arizona at the time of the severance hearing, whereas Bobby Jr., just short of nine months old at the time of the hearing, lived hours away in Pinal County.

¶17 The evidence also showed Bobby Jr. had been living with his maternal aunt and uncle since he was two weeks old and had bonded with them, they were providing for his various needs, were committed to continuing to care for him, and wished to adopt him. To the extent there were conflicts in the evidence with respect to the child's best interest, it was for the juvenile court to resolve them after weighing the evidence and assessing the credibility of the various witnesses. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205 (appellate court defers to juvenile court to determine witness credibility, evaluate evidence, and resolve conflicts in evidence).

¶18 For the reasons stated, the juvenile court's order terminating Bobby J.'s parental rights to Bobby Jr. is affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge